

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MANUEL RUIZ,)	
)	
Claimant,)	IC 2001-017534
)	
v.)	
)	
CORNERSTONE MANUFACTURING,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Employer,)	AND RECOMMENDATION
)	
and)	
)	Filed October 1, 2007
EVEREST NATIONAL INSURANCE CO.,)	
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on November 7, 2006. Claimant, Manuel Ruiz, was present in person and represented by Paul T. Curtis of Idaho Falls. Defendant Employer, Cornerstone Manufacturing (Cornerstone), and Defendant Surety, Everest National Insurance Co., were represented by David P. Gardner, of Pocatello. Dillon Steed of Pocatello served as the English-Spanish interpreter. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on May 15, 2007.

ISSUES

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1

The issues to be resolved are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident,
2. Whether Claimant's condition resolved following the alleged June 26, 2001, accident,
3. Whether and to what extent Claimant is entitled to permanent disability in excess of impairment, and
4. Whether Claimant is entitled to any additional benefits.

ARGUMENTS OF THE PARTIES

Claimant maintains that as a result of his 2001 industrial back injury he is entitled to permanent impairment of at least 5% of the whole person as rated by Rex Head, M.D., or 17% of the whole person as rated by Henry West, D.C. Claimant also asserts entitlement to permanent disability in excess of his impairment in the amount of 21%. Lastly, Claimant maintains he is entitled to future medical benefits.

Defendants assert that Claimant is not credible, that he has not proven that any permanent impairment is related to his 2001 industrial accident, and that he is not entitled to any further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Claimant's Exhibit 1 admitted at hearing; and
3. Defendants' Exhibits 1 through 12 admitted at hearing.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

After having considered the above evidence, and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Claimant was 43 years old and had resided in American Falls for one month at the time of the hearing. He lived in Boise for six weeks, and in Pocatello for five or six months prior to residing in American Falls. Claimant received mail at his cousin's address in Idaho Falls at the time of the hearing.

2. Claimant was born in Mexico where he completed the sixth grade. He has had no further formal education. Claimant is married and has two children ages 5 and 6 in Mexico.

3. In 1983 Claimant came to the United States where he performed farm and construction work including shoveling and wheel barrowing. In approximately 1986, Claimant broke his left wrist but it healed without incident and thereafter did not hamper his work. In April 2000, Claimant injured his left ankle and was treated by Dr. Griffiths, who after some treatment wrote in his notes that Claimant was using the system. In approximately April 2001, Claimant commenced working for Cornerstone where he flood irrigated, moved sprinkler pipes, loaded trucks, and constructed and loaded kitchen cabinets. Claimant earned \$6.50 per hour and from \$500 to \$600 per week.

4. While at work on June 26, 2001, Claimant lifted the thrasher head of a combine and felt immediate back pain. Claimant notified his supervisor of the incident and continued to work. Claimant was earning \$6.50 per hour and testified he was living in Idaho Falls or Lewisville at the time of the accident. Claimant's back pain continued and after several days his supervisor sent him to Larry Nelson, D.C., who released Claimant from work and provided several chiropractic

treatments. Dr. Nelson's records indicate Claimant reported no pain radiating to the lower extremities, but that Claimant asked about the symptoms of a herniated disc.

5. In August 2001, Claimant saw Stephen Vincent, M.D., who diagnosed Claimant as suffering from a lumbar sprain. An MRI scan in September 2001 revealed a mild broad-based disc protrusion at L5-S1. Claimant responded well to treatment, including physical therapy, and Dr. Vincent released him to return to work. Defendants paid Claimant for his time loss.

6. Claimant was scheduled to see Dr. Vincent on September 27, 2001, but did not keep the appointment. Dr. Vincent thereafter declined to treat Claimant further. Claimant testified he had no notice of the appointment.

7. On that same day (September 27, 2001), Claimant presented to Richard Knoebel, M.D., for an IME at Defendants' request. Dr. Knoebel found that Claimant was not medically stable and recommended continued physical therapy and a return to work with lifting restrictions of 35 pounds occasionally and 20 pounds frequently. Dr. Knoebel also recommended EMG testing and referred Claimant to David Simon, M.D., for EMG testing. Claimant did not attend an appointment with Dr. Simon scheduled for November 14, 2001. Claimant testified he had no notice of the appointment.

8. On November 15, 2001, Defendants denied Claimant further benefits due to his failure to keep the September 27, 2001, appointment with Dr. Vincent and the November 14, 2001, appointment with Dr. Simon. Claimant denied receiving notice of these appointments. Cornerstone let Claimant go shortly thereafter as it had no further work for Claimant.

9. Claimant testified that from November 2001 to the date of hearing, his back pain gradually worsened and he noticed increased pain with heavy lifting, bending, and prolonged sitting.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

Claimant testified that he also had intermittent left leg pain. Claimant sought no medical care for his back between November 2001 and the time of hearing, except IME's with Dr. West in 2005 and Dr. Head in 2006. Claimant asserted he did not have funds to see a doctor. However, Claimant received medical treatment for right hand, left knee, and left ankle pain in 2002 but did not then report any back pain.

10. Between November 2001 and the date of hearing, Claimant performed various farm labor jobs. Claimant has not worked for more than three months consecutively for any one employer either before or after his accident. Claimant last worked from late September through early November 2006 during the harvest. He returns to Mexico every winter for several months where he works on his parent's farm.

11. In June 2006, Claimant gave his deposition without an interpreter. At hearing he asserted that he did not understand some of the deposition questions. At hearing Claimant testified mainly through an interpreter, however he became agitated on several occasions during cross-examination and responded adequately to questions in English without assistance from the interpreter.

12. At the time of hearing Claimant testified that he continued to have constant low back pain at a level of eight on a scale of one to ten, and intermittent left leg pain. Claimant testified he has had no other accidents since his 2001 industrial accident.

13. At the time of hearing, Claimant was not working. He has difficulty getting work because he cannot do heavy lifting and cannot move rapidly.

14. Claimant's incomplete responses and occasional belligerence at hearing persuaded the Referee that he is not an entirely reliable witness.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5

DISCUSSION AND FURTHER FINDINGS

15. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

16. **Causation.** A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

17. In the present case, Defendants acknowledge the occurrence of Claimant's industrial accident in 2001, but dispute whether his current low back symptoms are caused by that industrial accident and assert that the symptoms related to his industrial accident have long since resolved.

18. Both Henry West, D.C., who examined Claimant on August 19, 2005, and Rex Head, M.D., who examined Claimant on October 3, 2006, attributed Claimant's ongoing low back symptoms to his 2001 industrial accident. There is no persuasive medical evidence to the contrary.

19. The Referee finds that Claimant has proven that the low back symptoms caused by his 2001 industrial accident did not fully resolve and his current low back symptoms are caused by his 2001 industrial accident.

20. **Impairment.** Permanent impairment is an essential prerequisite for and the

foundation of permanent disability. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

21. Henry West, D.C., rated Claimant's permanent impairment at 17% of the whole person based upon a range of motion model. Rex Head, M.D., rated Claimant's permanent impairment at 5% whole person permanent impairment based upon a DRE methodology.

22. The impairment rating given by Dr. Head is consistent with the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, and thus is more persuasive than the rating given by Dr. West. Claimant has proven he suffers a permanent impairment of 5% of the whole person due to his industrial accident.

23. **Permanent Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected

by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

24. The degree of permanent disability suffered by a claimant is a factual question committed to the particular expertise of the Commission. McClurg v. Yanke Machine Shop, Inc., 123 Idaho 174, 176, 845 P.2d 1207, 1209 (1993). Wage loss may be a factor. Baldner v. Bennett's Inc., 103 Idaho 458, 649 P.2d 1214 (1982). The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

25. Claimant argues that he is entitled to a 21% permanent disability based upon his time of injury wage (\$6.50), as compared to the federal minimum wage at the time of hearing (\$5.15). Defendants assert that Claimant is entitled to no disability.

26. Claimant was earning \$6.50 per hour at the time of his industrial accident. His post-

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 8

accident earnings are difficult to assess because of inadequate documentation. Defendants requested copies of Claimant's tax returns for 2003, 2004, and 2005. Claimant never produced any returns. Claimant testified of chronic difficulty maintaining employment due to his inability to perform heavy lifting.

27. Claimant speaks and understands English fairly well, although not perfectly. He reads very little English. He has limited formal education, having completed only the sixth grade in Mexico. Claimant's past work skills are generally limited to farm and construction laborer positions. Dr. Head, who speaks Spanish and examined Claimant in Spanish, opined that Claimant also suffers a learning disability. Claimant's ability for heavy lifting and repeated bending is reduced by his industrial injury. Claimant testified that his ongoing back symptoms limit him from performing much of his former work.

28. Based on Claimant's impairment rating of 5% of the whole person, and considering his medical and non-medical factors, Claimant's ability to engage in gainful activity has been reduced. The Referee finds that Claimant suffers a permanent disability of 10%, inclusive of his permanent impairment.

29. **Additional medical benefits.** Claimant asserts entitlement to additional medical benefits for his ongoing back pain. Defendants assert Claimant cannot raise this issue as it was not noticed up for hearing and because he was non-compliant in missing medical appointments with Dr. Vincent and Dr. Simon.

30. Idaho Code § 72-713 requires the Commission give 10 days' written notice of the issues to be heard. The Notice of Hearing expressly identified one of the issues to be addressed at hearing was whether Claimant was entitled to any additional benefits. This issue was specified by

Defendants in their request for calendaring. A plain reading of “any additional benefits” must include medical benefits. In discussing the issues at the commencement of the hearing, Defendants’ counsel expressly responded to the assertion of Claimant’s entitlement to additional benefits stating: “It is our position ... that he is not entitled to any additional medical care as a result of the accident.” Transcript, p. 6, Ll. 18-22. Claimant is not barred by Idaho Code § 72-713 from presently asserting his entitlement to additional medical benefits.

31. Defendants argue, but cite no authority for, the proposition that Claimant should be barred from any future recovery because he failed to keep the September 27, 2001, appointment with Dr. Vincent, and also failed to keep the November 14, 2001, appointment with Dr. Simon. The parties dispute whether Claimant received notice of the appointments. Claimant testified he never received a letter notifying him of the appointments. Claimant acknowledged he has had eight different addresses in the last five years. He testified he has always used his cousin’s address as his mailing address. However, he also acknowledged receiving checks at another address. Significantly, Claimant did attend an IME scheduled for him by Defendants with Dr. Knoebel the very same day he missed his scheduled appointment with Dr. Vincent. Although both exams were scheduled for September 27, 2001, whether the time of the IME by Dr. Knoebel conflicted with the time of the appointment with Dr. Vincent is not clear.

32. On October 30, 2001, Defendants sent a letter advising Claimant of an appointment with Dr. Simon on November 14, 2001. Interestingly, the letter, written in English, directed Claimant to contact Defendants’ representative if Claimant could not arrange for an interpreter to attend the appointment with him. Claimant testified at hearing that he could not read English and that he was never notified of the November 14 appointment. When Claimant did not attend the

appointment, Defendants advised him by letter of November 15, 2001, that his benefits were terminated due to his noncompliance. Claimant thereafter repeatedly sought, and was denied, further medical treatment with Dr. Vincent.

33. Idaho Code § 72-434 provides that if an injured worker “unreasonably fails to submit to ... an examination by a physician ... the injured employee’s right to take or prosecute any proceedings ... shall be suspended until such failure or obstruction ceases and no compensation shall be payable for the period during which such failure or obstruction continues.” (Emphasis supplied.)

Regardless of whether Claimant indeed received and understood notification of the appointments, any non-compliance was short-lived in that he sought further treatment from Dr. Vincent and also sought to arrange further treatment through Defendants’ adjustor. The Referee is not persuaded that Claimant continues to refuse examination by Dr. Vincent or Dr. Simon. Claimant is not barred from presently asserting his entitlement to reasonable additional medical benefits.

34. Claimant’s assertion, and the Referee’s finding, of 5% permanent impairment presupposes that Claimant has reached maximum medical stability. While Idaho § 72-432 generally authorizes Claimant to receive reasonable medical treatment as necessary for his industrial injury, Claimant does not specify what treatment he currently seeks. Claimant has not, at this time, proven his entitlement to any specific additional medical benefits.

CONCLUSIONS OF LAW

1. Claimant has proven that the low back symptoms caused by his 2001 industrial accident did not fully resolve, and his current low back symptoms are caused by his industrial accident.

2. Claimant has proven he suffers permanent partial impairment of 5% of the whole

person due to his industrial accident.

3. Claimant has proven he suffers permanent disability of 10%, inclusive of his permanent impairment.

4. Claimant is not barred from seeking, but has not proven his present entitlement to, any specific additional medical benefits.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this 18th day of September, 2007.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _1st____ day of _October_____, 2007, a true and correct copy of Findings of Fact, Conclusions of Law, and Recommendation was served by regular United States Mail upon each of the following:

PAUL T CURTIS
598 N CAPITAL AVENUE
IDAHO FALLS ID 83402

DAVID P GARDNER
PO BOX 817
POCATELLO ID 83204-0817

ka

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MANUEL RUIZ,)	
)	
Claimant,)	IC 2001-017534
)	
v.)	
)	
CORNERSTONE MANUFACTURING,)	
)	
Employer,)	
)	ORDER
)	
EVEREST NATIONAL INSURANCE CO.,)	
)	Filed October 1, 2007
Surety,)	
)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant has proven that the low back symptoms caused by his 2001 industrial accident did not fully resolve, and his current low back symptoms are caused by his industrial accident.
2. Claimant has proven he suffers permanent partial impairment of 5% of the whole person due to his industrial accident.

ORDER-1

3. Claimant has proven he suffers permanent disability of 10%, inclusive of his permanent impairment.

4. Claimant is not barred from seeking, but has not proven his present entitlement to, any specific additional medical benefits.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this _1st_ day of __October_____, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R. D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

ORDER-2

CERTIFICATE OF SERVICE

I hereby certify that on the _1st_ day of _October____, 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

PAUL T CURTIS
598 NORTH CAPITAL AVENUE
IDAHO FALLS ID 83402

DAVID P GARDNER
PO BOX 817
POCATELLO ID 83204

ka

_/s/_____